No. 10-464

Supreme Court, U.S.
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In The
Supreme Court of the United States

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, REGIONAL ADMINISTRATOR; LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITION FOR REHEARING

The Petitioner, herein, respectfully moves this Court for an order (1) vacating its denial of the petition for writ of *certiorari*, entered on November 29, 2010, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. EPA's new interpretation of its rules – which represents a departure from its "cradle to grave" regulation of toxic characteristic hazardous wastes – is the type of decision that is subject to appellate review.

In its decision, refusing to review EPA's decision, the 5th Circuit Court of Appeals characterized EPA's decision as one committed to agency discretion and not subject to review. But the Court failed to acknowledge that the presumption of unreviewability does not apply when there is law to apply. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *National Wildlife Federation v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992).

Several Courts have recognized repeatedly that the Supreme Court's holding in *Chaney v. Heckler*, 470 U.S. 821 (1985), does not bar judicial review when an agency's regulation provides the Court with law to apply. *See, e.g., Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (citing decisions from 1st, 3rd and 6th Circuit Courts of Appeals). In this case, EPA's regulations provide the Court with law against which to scrutinize EPA's Determination.

The appellate court, below, cited *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987), for the proposition that an agency action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action. But, in reaching its decision in *ICC*, this Court was not construing the APA, and it was not faced with a decision by an agency "not to enforce." Rather, this Court's holding applied to an agency decision denying a petition for reconsideration. Those facts are distinct from those presented in this case.

This case presents a set of facts that, while short of unique, is unusual. Here, EPA did not simply refuse to initiate proceedings to withdraw Texas's RCRA program approval. Here, EPA first conducted an "informal investigation." It, then, made some factual assumptions. And following its investigation, in what it labeled a "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," the EPA recited a detailed legal analysis of the applicable law – not only the law that applies to withdrawing state program approval but, also, the law that applies to the specific factual scenario presented by EPA in this case. In a twelve-page analysis, the "Determination" went beyond determining whether cause exists to withdraw program approval.

Where, as here, an interested and affected member of the regulated community requests that EPA evaluate the state's approved hazardous waste program to determine whether it should be withdrawn,

EPA should not use this opportunity to, in effect, announce new regulatory requirements and policies and, for good measure, apply those new regulatory requirements to a set of "facts" that have not been formally adjudicated. An informal investigation and written response to a petition must, at the very least, conform to the applicable law. Congress could not have intended, when it required EPA to respond to a petition, that EPA would use that response as an opportunity to re-interpret the law, so as to render its application arbitrary and capricious.

In this case, the result of EPA's conduct is that a legal document now exists, one that includes EPA's "legal analysis" of its applicable statutes and rules, and that document reflects that EPA no longer regulates toxic characteristic hazardous waste from "cradle to grave." The document reflects that EPA has departed from its prior interpretation of its governing statute and of its own rules. Prior to the Determination's release, the agency's interpretation had been that the land disposal restrictions attached at the point of hazardous waste generation and that there could be only one point of generation. Now, EPA opines that, once hazardous waste has been diluted, there may be a new point of generation and a new set of applicable land disposal restrictions. This departure from the prior understanding would appear to apply at least in the state of Texas, if not in all other states that have been delegated hazardous waste regulatory authority.

This new interpretation of law is the type of agency action that must be scrutinized by the judiciary. To accord non-reviewable status to this new interpretation, because it is announced as the rationale for non-enforcement, deprives the public of benefits Congress rightfully seeks to secure by judicial oversight of agency action. It allows agencies to avoid their settled self-imposed restrictions on discretion (i.e., their earlier interpretations). This increases the risks that similarly-situated individuals will be treated disparately. Non-review removes, also, some measure of faith in the public that the administrative state, with its labyrinthine regulations and vast practical power, maintains a level playing field for competitors within the public. Finally, non-review undermines an important reasonable market expectation: participants in commercial transactions apportion risks among themselves, in part, in reliance on established regulatory interpretations (and on the fact of safeguards that customarily accompany changes in those interpretations).

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of *certiorari*, Petitioner prays that this Court grant rehearing of the

order of denial, vacate that order, grant the petition, and review the judgment and opinion from below.

Respectfully submitted,

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346

Counsel for Petitioner

December 27, 2010

CERTIFICATE OF COUNSEL

As counsel for the petition, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

David O. Frederick